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Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	
Table of Allotments	)	MB Docket No. 02-136
FM Broadcast Stations	)	RM-10458
(Arlington, The Dalles, Moro, Fossil, Astoria,	)	RM-10663
Gladstone, Portland, Tillamook,	)	RM-10667
Springfield-Eugene, Coos Bay, Manzanita	)	RM-10668
and Hermiston, Oregon, and	)	
Covington, Trout Lake, Shoreline, Bellingham,	)	
Forks, Hoquiam, Aberdeen, Walla Walla,	)	
Kent, College Place, Long Beach and	)	
Ilwaco, Washington)	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Office of the Secretary
Attn: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

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September 7, 2004

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SUMMARY

Mid-Columbia Broadcasting, Inc. and First Broadcasting Investment Partners, LLC ("Joint Parties") oppose the Application for Review filed by Triple Bogey, LLC, MCC Radio, LLC, and KDUX Acquisition, LLC ("Triple Bogey"). The *Report and Order* in this proceeding granted the Joint Parties' original proposal involving, *inter alia*, a new allotment at Covington, Washington. In doing so, the Commission's staff permitted the Joint Parties to withdraw an amended proposal that they had properly and timely filed, after that amended proposal was rendered defective by the withdrawal of a necessary party's consent. The staff also dismissed Triple Bogey's counterproposal because it lacked the consent of the same party to the same change to its facility.

Triple Bogey argues that the staff should not have granted the Joint Parties' Covington proposal because it would, allegedly, have created "white" and "gray" areas, *i.e.*, areas that have no aural reception service or one aural reception service, respectively. The Joint Parties demonstrate, to the contrary, that in accordance with longstanding precedent the proposal creates no white or gray area, and the staff's action was clearly correct. There are sound reasons for maintaining the distinction, which Triple Bogey ignores, between reception service and transmission service in allotment proceedings.

Triple Bogey asserts that the staff should not have dismissed its own counterproposal, arguing for a reversal of the principle that the Commission will not order an unwilling licensee to implement a directional antenna. However, the Commission should decline the invitation to make new law in this regard, since doing so would undermine the integrity of the Table of Allotments on which FM allocations are based and would serve no useful policy goal.

Finally, Triple Bogey argues that the staff should not have reinstated the Covington proposal after the Joint Parties withdrew their amended proposal in the absence of a continuing expression of interest in a Covington allotment. However, here as well the staff were on a firm footing and acted in accordance with precedent. Moreover, no policy goal would be served by dismissing the one acceptable proposal remaining in the proceeding only to have it be re-filed,

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OPPOSITION TO APPLICATION FOR REVIEW

Mid-Columbia Broadcasting, Inc. ("Mid-Columbia"), licensee of Station KMCQ(FM), The Dalles, Oregon and First Broadcasting Investment Partners, LLC ("First Broadcasting"), ("Joint Parties"), by their respective counsel, and pursuant to Section 1.115(d) of the Commission's Rules, hereby oppose the Application for Review filed in the above-captioned proceeding on August 20, 2004 by Triple Bogey, LLC, MCC Radio, LLC, and KDUX Acquisition, LLC (collectively "Triple Bogey").[1]

1. Triple Bogey argues in its Application for Review that (1) the Joint Parties' counterproposal will create "white" and "gray" area and is thus unacceptable; (2) its own counterproposal, which would have forced the use of a directional antenna on an unwilling

[1] On August 20, 2004, Mercer Island School District filed a Petition for Reconsideration. Public Notice of that filing was issued on Sept. 2, 2004 (Report No. 2671), and the date for oppositions will be set upon publication of the Public Notice in the Federal Register. The Joint Parties intend to address Mercer Island's pleading in a separate filing at that time.

licensee, was acceptable; and (3) the Commission should not have reinstated the Joint Parties' Covington proposal after their Kent proposal became unworkable for failure of a required consent. All three of these arguments are contrary to existing case law, and the Commission should not disturb the staff's decisions on review.

2. The standard for review is set out in Section 1.115(b)(2). The party seeking review must demonstrate that the staff action: (a) is in conflict with existing law, case precedent or policy; (b) involves a novel question of law or policy; (c) involves case precedent or policy which should be overturned; (d) results from an erroneous finding of a material fact; or (e) constitutes prejudicial procedural error. Triple Bogey asserts that it meets clauses (a) and (b) – that is, that the staff action is partly in conflict with existing case law and partly involves novel questions of law or policy. App. for Review at 2. As will be shown, Triple Bogey's arguments fail to meet these standards, and indeed, fail on all counts. With respect to every issue raised by Triple Bogey, the staff acted in accordance with applicable precedent. The existing rules are founded on sound policy considerations, and should not be overturned.

I. The Joint Parties' Counterproposal Will Not Create White or Gray Area.

3. Triple Bogey argues that the staff erred in granting the Joint Parties' Covington proposal because it will create "white" and "gray" areas (*i.e.*, areas that have no aural reception service or one aural reception service, respectively) in the area formerly served by KMCQ. App. for Review at 14-19. But Triple Bogey's legal analysis is flawed. In fact, the staff's decision was consistent with applicable law. The reason that the Covington proposal will *not* create white or gray areas is that the Joint Parties proposed, and the Commission granted, new allotments that replace the loss of service to these areas. Specifically, the new allotments of Channel 283C2 at Moro, Oregon, 261C2 at Arlington, Oregon, and 226A at Trout Lake, Washington, ensure that every person in the KMCQ loss area will receive at least two aural services.

4. What Triple Bogey fails to understand is that the Commission's policies with respect to the loss of an area's sole *reception* service are not the same as its policies with respect to the loss of a community's sole *transmission* service. Throughout the history of FM allotment proceedings, the Commission's policy has been that *potential* service, not actual service, is the measure of reception service. This means that if an area is located within the theoretical service contour of a vacant allotment, it is *not* a white area. If it is located within the theoretical service contours of more than one allotment, it is not a gray area.

5. This principle was clearly articulated in *Greenup, Kentucky and Athens, Ohio*, 6 FCC Rcd 1493 (1991). There, the Commission stated:

> We reiterate the general principle implicit in *Roanoke Rapids* that, in determining whether an FM allotment would provide first or second aural service, the Commission *should normally assume that service will be provided on existing vacant allotments*. We conclude that both the new allotment at McArthur, Ohio, and the upgrade of Station WKOV-FM at Wellston, Ohio, would provide full-time aural service.[2]

6. To the Joint Parties' knowledge, this principle has never been reversed or questioned by the Commission. Triple Bogey certainly cites no case in which any other result was reached. *Modification of FM and TV Authorizations to Specify a New Community of License,* 5 FCC Rcd 7094 (1990) ("*Community of License*"), and *Pacific Broadcasting of Missouri*, LLC, 18 FCC Rcd 2291 (2003), *recon. denied*, FCC 04-140 (rel,. June 16, 2004) ("*Pacific*"), both cited by Triple Bogey, deal with the loss of a community's *transmission* service – a completely different subject. In *Community of License*, the Commission restated its prohibition against removal of a community's sole local transmission service in the course of a change of community of license. *Community of License*, 5 FCC Rcd at 7096. In *Pacific*, the

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[2] *Greenup, Kentucky*, 6 FCC Rcd at 1494 (emphasis added).

Commission directed the staff to cease the practice of allotting "backfill" allotments to avoid the loss of a community's sole local transmission service when a station changes its community of license. *Pacific*, 18 FCC Rcd at 2296. Accordingly, these cases are inapplicable to white or gray area, in which reception service is at issue.

7. To the extent that Triple Bogey believes the Commission should change its policy and apply the principles of *Community of License* and *Pacific* to situations involving the removal of reception service, the Commission should decline to do so. Those policies serve different goals. The Commission has long required that a replacement station be constructed and placed on the air before a community's sole existing and operational station may relocate.[3] In recent years, this requirement has caused hardship and taxed the Commission's resources, since the allotment process has been backlogged by auction concerns and rule making proponents have endeavored to implement their changes through applications for special temporary authority. The *Pacific* policy is simply a way for the Commission to avoid additional problems of this nature in the future.[4]

8. However, the problems that led to the *Pacific* policy in community of license cases – *i.e.*, delays in activation of new allotments and potential abuse of STA process – have no bearing whatsoever on the use of vacant fill-in allotments to preserve reception service. Whereas the Commission has never considered a vacant allotment to be an adequate replacement for an community's sole transmission service, vacant allotments have always been considered as adequate replacements for the purpose of white and gray area coverage. For this reason, the

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[3] *See Barnwell, South Carolina et al.*, 17 FCC Rcd 18956 (2002) (requiring activation of replacement service before relocation of existing station); *Alva, Mooreland, Tishomingo, Tuttle, and Woodward, Oklahoma*, 17 FCC Rcd 14722 (2002) (granting change in community of license only when replacement service had commenced operation at Tishomingo); *Refugio and Taft, Texas*, 15 FCC Rcd 8497 (1997); *Llano and Marble Falls, Texas*, 12 FCC Rcd 6809 (1997); *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

[4] *See Barnwell, South Carolina, supra* (refusing to grant interim STA to serve new community).

elimination of white and gray areas is not required to await the activation of a station. Instead, white and gray areas are eliminated as soon as an allotment is made. *Greenup, Kentucky, supra*, 6 FCC Rcd at 1494. Therefore, the considerations that led the Commission to announce its Pacific policy with respect to the loss of a community's sole transmission service are not present when white and gray areas are at issue.

9. The other cases cited by Triple Bogey actually undermine its position. In *Pecos and Wink, Texas*, 14 FCC Rcd 2840 (1999), an unbuilt construction permit was considered as providing white and gray area coverage, and no delay in the activation of a new community service was required. In *Cheyenne, Wyoming and Gering, Nebraska*, 15 FCC Rcd 7528 (2000), the removal of an authorized but unbuilt station was considered to create gray area. In *Littlefield, Wolfforth and Tahoka, Texas*, 12 FCC Rcd 3215 (1997), *partial recon. granted on other grounds*, 15 FCC Rcd 5532 (2000), removal of an unbuilt station was likewise considered to create gray area. Thus, these cases all support the principle that the creation of white or gray area is avoided when an allotment is made. The establishment of a new allotment does not delay the implementation of a change in community of license when the only issue is the loss of reception service. There is no reason to change that policy now.

II. Triple Bogey's Counterproposal Was Defective and Could Not be Granted.

10. Triple Bogey argues that the staff erred in finding its own counterproposal to be defective for failure to include a required consent. App. for Review at 19-24. Again, Triple Bogey is incorrect. As part of its counterproposal, Triple Bogey requested that the FCC substitute Channel 281C for Channel 282C at Bellingham, Washington, and modify the license of Station KAFE accordingly. This is the same request that the Joint Parties included with their Kent proposal. As the Joint Parties recited, however, this channel substitution was not possible without the consent of Saga Broadcasting, LLC, the licensee of KAFE. Saga's consent was

required because the use of Channel 282C at Bellingham would, under international agreement, have required Saga to employ a directional antenna to protect Canadian allotments at Bralorne and Powell River, and it is the Commission's policy not to require the use of a directional antenna without the licensee's consent. *See Wasilla, Alaska*, 14 FCC Rcd 6263 (1999).

11. When the Joint Parties filed their Kent proposal, they provided Saga's consent statement for the channel change at Bellingham. Indeed, it was the subsequent withdrawal of this consent that required the Joint Parties to rely on their original Covington proposal. The Commission implicitly affirmed the principle that the Kent proposal was not viable absent Saga's consent by holding that the Joint Parties' Kent proposal was acceptable under the standards set forth in *Taccoa, Sugar Hill and Lawrenceville, Georgia*, 16 FCC Rcd 21191 (2001).[5] "[I]t was not incumbent upon the Joint Petitioners to file, as its original Petition for Rule Making, a reallotment of Channel 283C2 to Kent based on the possibility that Saga Broadcasting may eventually agree to a channel substitution and/or directional antenna pattern at Bellingham." *Report and Order* at ¶ 3. In other words, the consent of Saga was the decisional difference between the Covington and Kent proposals.

12. Triple Bogey, on the other hand, did not file its proposal with Saga's consent, and never had Saga's consent. This lack of consent was fatal to the consideration of its counterproposal. *See Wasilla, Alaska, supra.* Triple Bogey cites no case in which the Commission reached any other result. Accordingly, on this question, too, the staff acted in accordance with existing law. Undeterred, Triple Bogey asks the Commission to reverse the staff's decision and to permit the involuntary imposition of a directional antenna in the "very

[5] In *Taccoa*, the Commission held that an amended proposal would be acceptable only if the proponent could demonstrate good reason why the amended proposal could not have been filed in the first instance. 16 FCC Rcd at 21192.

narrow set of circumstances" presented in this case. App. for Review at 24. The Commission should decline to do so.

13. The circumstances that Triple Bogey describes as "very narrow" are not at all narrow. There are hundreds of FM stations within 50 miles of the Canadian and Mexican borders. Under Triple Bogey's theory, any one or all of these licensees could be ordered onto a new channel with a requirement that it install a directional antenna to protect a Canadian or Mexican allotment. Or, amounting to the same thing, a licensee could be ordered to change its transmitter site to achieve the desired protection. The staff correctly stated that either of these procedures presents administrative difficulties. There is no guarantee that a transmitter site will be available and suitable for the construction of a broadcasting antenna structure. Similarly, there is no guarantee that a directional antenna can be designed to meet an arbitrary pattern.

14. Triple Bogey portrays this as a matter that affects only a station's coverage over Canada. App. for Review at 24. But it goes to the heart of the Commission's allotment processes. The Commission maintains the integrity of the Table of Allotments by requiring every allotment to be fully spaced. *See e.g., Murrieta, Arcadia, Fallbrook, Yucca Valley, and Desert Hot Springs, California*, 17 FCC Rcd 19458 (2002). "Strict adherence to the spacing requirements reflected in the Table is 'necessary . . . in order to provide a consistent, reliable, and efficient scheme of [allotting] channels." *Id.* at ¶ 19. This principle extends to allotments in border areas, and requires such allotments to be fully spaced according to applicable spacing rules established by international agreement. Triple Bogey would have the Commission casually discard this bedrock requirement in pursuit of its proposal for an upgrade at Shoreline,

Washington.[6] However, other than enabling the grant of its proposal, Triple Bogey gives no reason why the Commission should overturn its policy in this regard.

III. The Commission Correctly Processed and Granted the Covington Proposal when the Kent Proposal Became Unworkable.

15. Triple Bogey argues that the staff erred in processing and granting the Joint Parties' original Covington proposal when the Kent proposal no longer could be pursued due to the lack of Saga's consent to the modification to KAFE. However, the staff was clearly correct to do so. No policy goal would be advanced by dismissing the Covington proposal. As discussed previously, Triple Bogey's counterproposal was defective for the same reason the Kent proposal was defective. But the Covington proposal was acceptable, and was not in conflict with any acceptable proposal in the proceeding. If the staff had dismissed it, the Joint Parties could have immediately re-filed it. That would just result in needless duplication of processing effort and delays in the introduction of service.

16. The decision to grant the Covington proposal was in accord with precedent. In *Taccoa, supra*, the original petitioner proposed to reallot a channel from Toccoa to Sugar Hill, Georgia. At the comment deadline, the petitioner counterproposed to allot the channel to Lawrenceville, Georgia instead of Sugar Hill as originally proposed, expressing an interest in the Lawrenceville allotment. The Commission nevertheless granted the Sugar Hill allotment without requiring a continuing expression of interest. *Taccoa, Georgia, et. al*, 16 FCC Rcd 14069 (2001), *recon.*, 16 FCC Rcd 21191 (2001). Only when, on reconsideration, the petitioner

[6] It is worth noting that Triple Bogey cannot possibly benefit by advocating this position. Triple Bogey fails to realize that even if the Commission were to force a directional antenna upon KAFE in order to make the channel substitution comport with the Canadian treaty, the Joint Parties could have been the beneficiary of the same policy for their Kent proposal. Rather than being defective for lack of consent, the Kent proposal would have been viable for the reason that Triple Bogey advocates, namely, the involuntary imposition of a directional antanna along with the substitute channel for KAFE. If that were the case, Triple Bogey would still be unable to succeed on the merits with their proposal due to the larger population of Kent (pop. 79,524) versus Shoreline (pop. 53,025) under the Commission's allotment priorities. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

expressly *withdrew* its expression of interest in Sugar Hill, did the Commission set aside its action granting an allotment to Sugar Hill. *Taccoa*, 16 FCC Rcd at 21191. The staff action in this case was consistent with *Taccoa*. Just as in that case, no expression of interest was required in order to reinstate the original proposal when the counterproposal could not be granted.

17. Triple Bogey accuses the Joint Parties of playing games with the allotment procedures. App. for Review at 14. That accusation is absurd. The Joint Parties wish to achieve the best possible service to the public and the best possible gains for KMCQ, and to do so as rapidly as possible. The Joint Parties realized, just as Triple Bogey realized, that the best possible service gains could be achieved with Saga's cooperation. When it appeared that no agreement with Saga could be reached, however, the Covington proposal represented the Joint Parties' best chance to advance its goals. That conclusion resulted in the initial petition for Covington.

18. As the Joint Parties have represented to the Commission, agreement with Saga was subsequently reached, in part because of policy statements from Industry Canada. This agreement enabled the filing of the Kent proposal. The Joint Parties can hardly be faulted for attempting to maximize service gains in this manner. However, due to subsequent events, Saga withdrew its consent before a decision was reached in this proceeding. The Joint Parties reported this fact to the Commission, and withdrew the no longer viable Kent proposal.

19. There is no agreement between the Joint Parties and Saga. There have been negotiations between First Broadcasting and Saga in an attempt to reach an agreement just as there have discussion between representatives of Triple Bogey and Saga towards a similar end. With no agreement, however, there can be no Kent proposal and no Shoreline proposal. This is not gamesmanship. It is simply a matter of acting in accordance with the Commission's rules

and policies. Any characterization to the contrary is based upon pure speculation and amounts to a desperate attempt to influence the Commission's thinking on this matter.

20. Triple Bogey argues that reinstatement of the Covington proposal is barred under the Commission's policy not to entertain alternative proposals advanced by the same party. *See, e.g., Winslow, Camp Verde, Mayer and Sun City West, Arizona*, 16 FCC Rcd 9551 (2001). However, that policy is not applicable to this case. There, the rule making proponent presented the Commission with two alternatives, in effect inviting the Commission to choose which one to process. *Id.* at ¶ 2. The Commission noted that this required it to "speculate" on which proposal was preferable, and to subject itself to potential reconsideration no matter which way it chose. *Id.* at ¶ 9. But those concerns do not arise here. At no time was the Commission required to speculate on whether the Covington or Kent proposal was preferred. Moreover, there was no opportunity for the Joint Parties to second-guess any decision of the Commission in that regard. Instead, this situation is more like *Taccoa, supra,* in which a rule making proponent amended its original proposal. As discussed above, the Commission did not bar such amendments. Rather, it stated that such amendments would be "carefully review[ed]" and could be accepted if accompanied by an adequate explanation. *Taccoa*, 16 FCC Rcd at 21192.

21. The similarity with *Taccoa* ended, however, when Saga withdrew its consent causing the Joint Parties to withdraw the Kent proposal. At that point, the Covington proposal remained as the only acceptable proposal among the various mutually exclusive proposals that had been submitted.[7] It is important to recognize that the Covington proposal had been fully subjected to the Administrative Procedure Act's requirement of notice and comment. All interested parties had the opportunity to comment on or file a counterproposal to the Covington

[7] An additional proposal of New Northwest Broadcasters, LLC was granted with an alternative channel that eliminated any conflict with the remaining proposals. *See Report and Order.*

proposal. Several parties did so. As discussed above, it would have been wasteful of the Commission's resources and contrary to the public interest in the rapid introduction of new service to dismiss the Covington proposal and subject it again to notice and comment procedures.

CONCLUSION

The Joint Parties went to great lengths to ensure that their proposal was in compliance with the Commission's law and policy at all times. The staff decision granting the Joint Parties' Covington proposal was in accordance with established principles. Triple Bogey has not cited a single applicable case to the contrary, and has failed to demonstrate why the law should be changed in any respect.

WHEREFORE, for the foregoing reasons, the Commission should deny the Application for Review and affirm the grant of the Joint Parties' proposal for a first local service at Covington, Washington.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa M. Holland, a secretary in the law firm of Vinson & Elkins, do hereby certify that I have on this 7th day of September, 2004 caused to be mailed by first class mail, postage prepaid, copies of the foregoing "Opposition to Application for Review" to the following:

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